



#311

U.S. CONSUMER PRODUCT SAFETY COMMISSION

WASHINGTON, D. C. 20207

April 16, 1990

OFFICE OF THE
GENERAL COUNSEL

Mr. Bernie Reamer
Legal Assistant
Richard H. Powell, P.A.
P.O. Drawer 2167
92 Eglin Parkway, N.E.
Fort Walton Beach, Florida 3254902167

☒ Cleared
4/30/90
☒ No Mfrs/Prvtlbrs or
products identified
- Excepted -
Firms Notified,
Comments Processed.

Re: Your Clients: Randy and Sharon Carpenter

Dear Mr. Reamer:

This is in response to your letter dated March 15, 1990 concerning an incident that involved a wolf-hybrid dog. You noted that a CPSC advisory opinion issued in 1974 (No. 78) concluded that pet turtles are consumer products under the Consumer Product Safety Act ("**CPSA**"), 15 U.S.C. 2051 et seq., and you inquired whether any other animals would be considered consumer products.

It is the view of the Office of the General Counsel that a wolf-hybrid dog would not be a consumer product under the CPSA. We have re-examined the 1974 opinion concerning pet turtles, and believe that Congress did not intend to include live animals, as such, within the definition of a "**consumer product**," subject to the CPSA.

The statute defines a consumer product as "**any** article, or component part thereof, produced or distributed (i) for sale to a consumer for use in or around a permanent or temporary household or residence, a school, in recreation, or otherwise, or (ii) for the personal use, consumption or enjoyment of a consumer in or around a permanent or temporary household or residence, a school, in recreation, or otherwise...." The 1974 opinion focused on the word "**article**" used in the statutory definition of the term "**consumer product**," rather than on the concept of "**product**," which is also included in the statute and must be considered in this inquiry. 15 U.S.C. § 2052 (a) (1).

Upon reconsideration, it is not clear whether the term "**article**" includes or excludes turtles; however, the use of the

ADVISORY OPINION

term ****product**** would seem to connote something processed or manufactured. See generally Black's Law Dictionary (5th ed. 1979) (referring to products as ****goods produced or manufactured either by natural means, by hand, or with tools, machinery, chemicals, or the like****). From this definition, it appears that living animals, as such, are not consumer products. It is conceivable that an animal somehow subjected to processing could be a consumer product. However, we do not now decide that issue, as a determination in such a case would depend on the particular facts presented.

There is no indication in the legislative history of the CPSA that Congress intended to include pets or other animals within the definition of ****consumer products****. We are unable to find any reference to pets in the legislative history. Rather, the products that Congress did single out are such things as architectural glass, televisions, furnaces, bicycles, infant furniture, power tools, lawnmowers, and other manufactured goods. 118 Cong. Rec. H8568 (Sep. 20, 1972) (statement of Rep. Staggers). The Report of the House Commerce Committee expressed concern with ****product-related injuries****. See, e.g., House Report at 21. The House Report frequently refers to the impact upon, and participation of, ****industry**** and ****manufacturers****. See, e.g., House Report at 26. Use of these terms supports the view that Congress was not thinking of items that are not capable of being manufactured or processed, such as live animals, when it devised this legislation. See also 15 U.S.C. § 2051 (a)(4). Similarly, the floor debates on the legislation and later proposed amendments also support this interpretation. See 118 Cong. Rec. H8566 (Sep. 20, 1972) (statement of Rep. Staggers) (discussion of participation by ****industry****); 118 Cong. Rec. S9930 (June 21, 1972) (statement of Sen. Eagleton) (discussion of ****manufacturing defects****); 121 Cong. Rec. H7780 (July 29, 1975) (statement of Rep. McClory) ("My understanding is that it deals with products, that is, manufactured products").

Provisions of the statute itself support the view that Congress intended the CPSA to apply to items that are manufactured or processed, rather than to live animals as such. For example, section 15 of the CPSA establishes a system of notification if a consumer product presents a substantial product hazard. The section places responsibility on every person involved with the product in the chain of commerce. The statute divides the chain of commerce into the categories of manufacturers, distributors and retailers. 15 U.S.C. § 2064. As these terms are defined in the CPSA, distributors and retailers must be persons "to whom a consumer product is delivered or sold." 15 U.S.C. § 2052(a)(4) and (5). Thus, since all

distributors and retailers must receive the product from someone else, all products must originate with a manufacturer, which is the only other category in the chain of commerce.

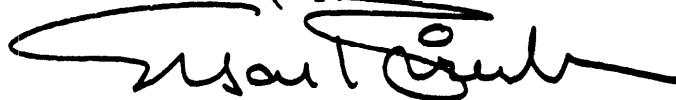
A ****manufacturer**** is **"any person who manufactures or imports a consumer product."** Id. § 2052(a)(4). The term ****manufactured**** is defined as **"to manufacture, produce, or assemble."** Id. § 2052(a)(8). As the intent of section 15 is to include **all** persons in contact **with** a consumer product through the chain of commerce, and as this chain originates with a ****manufacturer,**** it follows that a live animal that has not been manufactured or processed in some manner is not included within the term ****consumer product.****

The Final Report of the National Commission on Product Safety (**"Commission Report"**), which was the foundation for the CPSA, lends further support to the view that live animals should not be considered ****consumer products**** within the CPSA. The Commission looked at injury statistics for such products as appliances, home furnishings, home fixtures, recreational equipment, heating devices, home tools, cleaning products, clothing, cosmetics, and pesticides. Commission Report at 10, table 1; and 37-45. Many other types of products were examined, but not live animals. Commission Report at 9-36. And, as with Congress, the Commission Report considered the role of the **"manufacturer"** in producing or distributing products subject to the Commission's jurisdiction.

For all of the above reasons, the Office of the General Counsel concludes that Congress did not intend pets or other living animals, as such, to be ****consumer products**** under the CPSA. Please be advised that, although the opinions expressed in this letter are based on the most current interpretation of the law by this office, they could subsequently be changed or superseded by the Commission.

I hope that this letter has **been** responsive to your inquiry.

Sincerely,

A handwritten signature in black ink, appearing to read "Susan E. Birenbaum", written over a horizontal line.

Susan E. Birenbaum
Acting General Counsel

March 15, 1990

United States Consumer Product Safety Commission
Washington, D.C. 20207

Attn: Susan E. Birenbaum, Acting General Counsel

Re: Our clients: **Randy** and Sharon Carpenter
Date of Accident: September 23, 1988

Dear Ms. Birenbaum:

This office represents Randy and Sharon Carpenter, parents of Nathan Carpenter, deceased minor, as a result of an incident that occurred involving a wolf-hybrid dog.

In our research on the Consumer Product Safety Act, we found under the miscellaneous products **headnote** of the annotation of § 2052 of 15 U.S.C. the following:

"**Pet** turtles are consumer products and subject to regulation by Consumer Products Safety Commission under the Consumer Product Safety **Act**", C.P.S.C. Advisory Opinion # 78 (January 29, 1974).

We are interested in finding out whether any other animals are also considered a consumer product.

On March 13, 1990, we talked with Bob Poth, Director of the Division of Regulatory Management, who indicated that this Advisory Opinion is no longer applicable and that the C.P.S.C. does not have jurisdiction over any pets any longer. Mr. Poth suggested that we write to **you** for further clarification especially regarding the regulations expanding on the notification provisions.

Any assistance that you could give would be appreciated.

Sincerely,



BERNIE REAMER
Legal Assistant

BR/mws

cc: Mr. & Mrs. Carpenter
David A. Simpson, Esq.

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CPSC
GENERAL COUNSEL OFFICE



U.S. CONSUMER PRODUCT SAFETY COMMISSION

WASHINGTON, D. C. 20207

March 6, 1991

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CPSA 6 (b)(1) Cleared

X 3/8/91
No Mfrs/Prvdrs or
Products Identified

Excepted by _____

Firms Notified, _____

Comments Processed.

OFFICE OF THE
GENERAL COUNSEL

Stephen S. Kellner, Esquire
Vice President and Corporate Secretary
Chemical Specialties Manufacturers Association
1913 Eye Street, N.W.
Washington, DC 20006

Clifford Rechtschaffen, Esquire
Deputy Attorney General
Department of Justice
State of California
2101 Webster Street
Oakland, CA 94612-3049

Gentlemen:

This is in response to a request from the Chemical Specialties Manufacturers Association for an advisory opinion from the Consumer Product Safety Commission addressing the following question.

Do the signal word and principal statement of hazard "WARNING: This product contains a chemical known to the state to cause cancer (or birth defects)," when used in connection with the sale (e.g., shelf sign, brochure, display sign) of an FHSA hazardous substance constitute "directions for use" pursuant to FHSA § 2(n), 15 U.S.C. § 1261(n), thereby rendering them accompanying literature subject to the labeling requirements of FHSA § 2(p), 15 U.S.C. § 1261(p)?

This office has also received correspondence from the State of California concerning how the Commission interprets the Federal Hazardous Substances Act ("FHSA") as it concerns issues raised by California's Safe Drinking Water and Toxic Enforcement Act (Proposition 65). Because the answer to CSMA's question is relevant to these concerns, this letter is also being sent to the California Department of Justice.

ADVISORY OPINION

Stephen S. Kellner, Esquire
Chemical Specialties, Manufacturers Association

Clifford Rechtschaffen, Esquire
California Deputy Attorney General

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The FHSA provides a comprehensive scheme for ensuring that hazardous substances intended for use in the household or by children bear cautionary labeling. Included within the FHSA's definition of hazardous substances are those substances that are toxic because they present a risk of cancer or other types of chronic toxicity, such as reproductive toxicity. CPSC General Counsel's Advisory Opinion No. 309 at 1 (March 19, 1987). Thus, a product would be regulated under the FHSA if (1) it is intended or packaged in a form suitable for use in the household or by children and (2) if the exposure to the product creates a significant risk of cancer or reproductive toxicity as a proximate result of any customary or reasonably foreseeable handling or use.

Section 2(p)(1) of the FHSA requires hazardous substances to bear certain types of label messages. Included within the types of labeling required are:

1. The name of each component that contributes substantially to the hazard,
2. A signal word (in the case of chronic hazards, "WARNING" or "CAUTION"),
3. An affirmative statement of the hazard or hazards (e.g., "Vapor harmful"),
4. Precautionary measures describing the action(s) to be taken or avoided,
5. Any necessary or appropriate instruction for first aid treatment,
6. Any required instruction for special handling or storage of the package, and
7. The statement "Keep out of the reach of children," or its equivalent.

FHSA Sec. 2(p) (1)(B), (D)-(J)(i), 15 U.S.C. § 2(p)(1)(B), (D)-... (i). Except for the signal word, the FHSA generally does not require particular label language and permits manufacturers to decide on the specific language. (In addition, the Commission may, by rule, require different or additional labeling where required by a special hazard presented by the substance. Section 3(b) of the FHSA, 15 U.S.C. § 1262(b). Where labeling cannot

Stephen S. Kellner, Esquire
Chemical Specialties Manufacturers Association

Clifford Rechtschaffen, Esquire
California Deputy Attorney General

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adequately protect the public, the Commission may ban a hazardous substance. **Sec.2(q)(1)(B)**, 15 U.S.C. § 1261(q)(1)(B).)

Section 2(n) of the FHSA defines "label." In addition to specifying that matter on the product or its container is part of the label, section 2(n) reads, in pertinent part:

a requirement [under the FHSA] that any word, statement, or other information appear on the label shall not be considered to be complied with unless such word, statement, or other information also appears ...
(2) on all accompanying literature where there are directions for use, written or otherwise.

15 U.S.C. § 1261(n) '(emphasis added). In other words, where accompanying literature contains directions for use, it must contain all the cautionary labeling required on the product label by the FHSA.

The Commission's regulations specify that:

"**accompanying literature" is interpreted to mean any placard, pamphlet, booklet, book, sign, or other written, printed, or graphic matter or visual device that provides directions for use, written or otherwise, and that is used in connection with the display, sale, demonstration, or merchandising of a hazardous substance

16 C.F.R. § 1500.3(c)(9) (emphasis added). Shelf signs, brochures, and display signs are "**accompanying literature" under this definition.

A warning that a product can cause cancer or birth defects is not an express direction for use. Nevertheless, it conveys the information that, in using the product, steps should be taken to minimize or eliminate exposure. Stated another way, the warning itself can also **serve** as a direction for use. An example of the dual function performed by statements warning of hazards a product presents is in the Commission's regulations at 16 C.F.R. § 1500.123. That section states:

Whenever the statement of the principal hazard or hazards itself provides the precautionary measures to be followed or avoided, a clear statement of the principal hazard will satisfy the requirements of section 2(p)(1)(E) [statement of principal hazard] and

Stephen S. Kellner, Esquire
Chemical Specialties Manufacturers Association

Clifford Rechtschaffen, Esquire
California Deputy Attorney General

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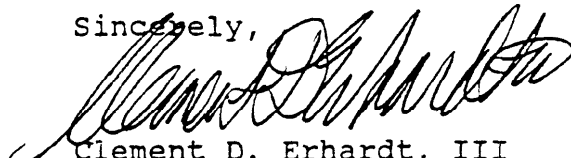
(F) [**precautionary measures describing the action to be followed or avoided"] . . .

Thus, for example, a product having flammable vapors might have a statement of principal **hazard**, such as "**FLAMMABLE**," that could serve also as the **required** statement of action to be avoided, which, if stated separately, might read "**do not use near open flame.**" Similarly, the statement of principal hazard "**HARMFUL IF SWALLOWED**" could negate the need to state additionally "**for external use only.**" Also, the statement "VAPOR HARMFUL" could also serve instead of an additional statement to "**avoid** prolonged inhalation of **vapors.**"

Therefore, although the warning quoted in your inquiry does not necessarily convey specific actions to be taken in the use of the product, it does convey information about how the product should be used (steps should be taken to reduce exposure). Accordingly, this office views the statement as a direction for use. It follows, **therefore**, that signs and the like bearing such warnings are "**accompanying** literature containing directions for **use**" and thus are labeling under FHSA § 2(n). The fact that such signs are considered labeling, however, does not mean that the sign complies with any or all of the FHSA labeling requirements described above.

I trust that this information responds fully to your inquiry. Please contact me if you have further questions.

Sincerely,



Clement D. Erhardt, III
General Counsel

Founded 1914

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1913 Eye St. N.W.
Washington, DC 20006

CHEMICAL SPECIALTIES MANUFACTURERS ASSOCIATION

202 / 872-8110
Telefax 202 / 872-8114

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POST
GENERAL COUNSEL OFFICE

90 SEP 14 P2:30

September 14, 1990

nad
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Clement D. Erhardt, III
General Counsel
Consumer Product Safety Commission
Room 200
5401 Westbard Avenue
Bethesda, Maryland 20816

Re: Request for CPSC Advisory Opinion Construing
FHSA Requirements for Accompanying Literature

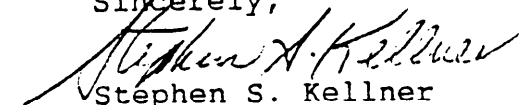
Dear Mr. Erhardt:

The Chemical Specialties Manufacturers Association ("CSMA") requests an advisory opinion from the Consumer Product Safety Commission construing the accompanying literature requirements under the Federal Hazardous Substances Act ("FHSA"), 15 U.S.C. §§ 1261-1276. Specifically, we seek clarification of the following issue:

1. Do the signal word and principal statement of hazard "WARNING: This product contains a chemical known to the state to cause cancer (or birth defects)" when used in connection with the sale (e.g., shelf sign, brochure, display sign) of an FHSA hazardous substance constitute "directions for use" pursuant to FHSA § 2(n), 15 U.S.C. § 1261(n), thereby rendering them accompanying literature subject to the labeling requirements of FHSA § 2(p), 15 U.S.C. § 1261(p)?

Our views on this issue are set forth in the enclosed memorandum. CSMA solicits your prompt guidance on this issue.

Sincerely,


Stephen S. Kellner

**MEMORANDUM CONSTRUING FHSA
ACCOMPANYING LITERATURE REQUIREMENTS**

1. Statutory and Regulatory Definition of
Accompanying Literature

FHSA § 2(n) defines "label," inter alia, to include written, printed, or **graphic** matter upon the immediate container of hazardous substances (or for unpackaged materials a display of such matter on tags) and further states that "a requirement made by or under authority of [FHSA] that any word, statement, or other information **appear** on the label . . . [is not satisfied] unless such word, statement, or other information also appears on all accompanying **literature** where there -are directions for use, written or otherwise." 15 U.S.C. § 1261(n) (emphasis added). Necessarily, FHSA § 2(n) implies a broad meaning to the term "directions for use" because it can be "written or otherwise." Thus, even mere symbols: may convey directions for use. For example, a symbol for **fire** with a red slash through it on a butane lighter fluid container directs the consumer not to use the product near. flames. Thus, a consumer would know from the symbol not to squirt **the** fluid into a flaming barbecue grill.

The Commission's regulations also describe directions for use to include printed words, pictures, designs or any combination further implying that the term should be given a broad meaning. See 16 C.F.R. § 1500.125 ("When any accompanying literature includes or bears any directions for use (by printed word, picture, design or combination thereof), such placard, pamphlet, booklet, book, sign, or other graphic or visual device shall bear all the **information** required by Section 2(p) of the act") See also 16 C.F.R. § 1500.3(c)(9) ("Accompanying literature" means written or unwritten material containing directions for use that are used in connection with the display, sale, demonstration, or merchandising of a hazardous substance intended for or packaged in a form suitable for use in the household or by children.)

The obvious purpose of the accompanying literature provision is to ensure that the manufacturer does not give partial information about the use of a hazardous substance. If the manufacturer gives any information concerning the safety of the product which heightens the awareness of a consumer, whether written or otherwise, he must give the complete label information for the product required under FHSA § 2(p). Viewed in this

context, most of the § 2(p) information is either an express or implied direction for use.

2. Required Accompanying Literature Statements

The FHSA § 2(p)(1) label statements required for accompanying literature are as follows:

- (A) the name and place of business of the manufacturer;
- (B) the common name of the chemical;
- (C) the "signal word" "DANGER," for substances which are extremely flammable;
- (D) the signal word "WARNING" or "CAUTION" for other hazardous substances;
- (E) an affirmative statement of the principal hazard (e.g., "Flammable," "Causes Burns," "Vapor Harmful,");
- (F) a statement of precautionary measures describing the action to be followed or avoided;
- (G) appropriate instructions for first aid;
- (H) the word "Poison" for any hazardous substance defined as "highly toxic" under the Act;
- (I) instructions for handling and storing packages which require special care; and
- (J) the statement "Keep Out of the Reach of Children," or adequate directions for use by children if the product is so intended.

15 U.S.C. § 1261(p)(1) (A) - (J).

Obviously, the name of a business or name of a chemical conveys no direction for use, but a careful inspection of every other label statement reveals an express or implied direction of proper and safe handling or use. An FHSA signal word like "DANGER" or "CAUTION" alerts the user of a household product to use the product with care. Likewise, principal statements of hazard warn the user to handle the product in a certain manner and to avoid a particular hazard. For example, the principal statement of hazard for acetone is "DANGER: EXTREMELY FLAMMABLE." This statement warns consumers not to use acetone near sparks or flames. Although the statement does not expressly direct the user against exposing the acetone to sparks or flames,

the statement impliedly **gives** this direction. It necessarily implies that the user **must** take such **care**. The statement of hazard for ammonia (**3-5%**) is "WARNING - IRRITANT HARMFUL IF SWALLOWED.* It does not expressly state "do not drink ammonia," yet it clearly implies not to do so. Products containing **5-25%** ammonia must state "POISON - MAY CAUSE **BURNS**." This statement of hazard does not directly advise to "avoid contact with eyes or skin," but that implication is clear and unmistakable.

3. Typical Principal Statements of Hazard
Conveying Implied Directions for Use

The following typical statements of hazard are implied directions for use.

Butyl Alcohol: WARNING HARMFUL IF SWALLOWED COMBUSTIBLE.
VAPOR HARMFUL. IRRITANT;

Borax: CAUTION - EYE IRRITANT;

Calcium Hydroxide: CAUTION - INJURIOUS TO EYES PROLONGED
CONTACT WITH WET SKIN MAY PRODUCE BURNS;

Cadmium Silver Solders: WARNING - POISONOUS FUMES **MAY** BE
FORMED ON HEATING;

Charcoal Lighter Fuel: DANGER - HARMFUL OR FATAL IF
SWALLOWED COMBUSTIBLE;

Carbon Bisulfide: DANGER - MAY BE FATAL IF INHALED OR
SWALLOWED EXTREMELY **FLAMMABLE**;

4. Cancer and Reproductive Toxicity Principal
Statements of Hazard Conveying Directions for Use

The methylene chloride labeling enforcement policy contains a Commission-sanctioned **label** that meets the minimum FHSA § 2(p) requirements. 52 Fed. Reg. 34,702 (Sept. 14, 1987). The principal statement of hazard on the label states in part CAUTION: VAPOR HARMFUL. The back panel of the label further states that methylene **chloride** has been shown to cause cancer in certain laboratory **animals**. The statement of hazard impliedly directs consumers to avoid breathing harmful methylene chloride vapors. Likewise the Commission's asbestos label and principal statement of hazard WARNING: BREATHING FIBERS MAY CAUSE CANCER directs consumers to **avoid** inhaling near the product. See 51 Fed. Reg. 33,911.12 (Sept. 24, 1986).

5. Scope of Directions for Use

Clearly, signs that contain brand names and price information are not accompanying literature. However, once the manufacturer provides information concerning the safety of the product it becomes accompanying literature and must be complete. To allow a manufacturer to avoid the accompanying literature requirements simply by omitting express directions for use or by limiting the display information to signal words and statements of principal hazard would undermine the consumer safety purposes of FHSA and invite abuse.

It makes no sense that a § 2(p)(I) statement on storage or handling would trigger all the § 2(p) label statements whereas a warning about being harmful if ingested would not. Such a constricted **reading** of "directions for use" is at odds with the provision that they may be "written or otherwise," see FHSA § 2(n), and the Commission's interpretation that **they may** be a "picture" or "design." 16 C.F.R. § 1500.125 It also defeats the very purpose of the accompanying literature requirement which is to ensure that any express or implied direction for use triggers all the § 2(p) label statements. If a manufacturer, for example, can give signal words and statements of principal of hazard without having to give the **remaining** § 2(p) statements, he has a license to say what he will about the hazards of a product in literature displayed at point-of-sale irrespective of any contrary precautionary labeling. Clearly, Congress did not intend such a loophole for the manufacturer -- or for the states.

The Commission's regulations on the "Condensation of label information," 16 C.F.R. § 1500.123, acknowledge that a statement of principal hazard itself may contain all the necessary precautionary measures to be followed or avoided and thereby may satisfy FHSA § 2(p)(1)(E) label requirements. As "action to be followed or avoided," precautionary measures are undeniably directions for use. If statements of principal hazard may constitute such express directions for use (in the case of certain precautionary measures), they are at least implied directions for use in every other case.

6. Misbranding

Literature accompanying a product is misbranded if it contains only part of the information required under FHSA § 2(p). See 15 U.S.C. § 1261(p). For example, if instructions for handling or for storage are not accompanied by all statements required on the label the product would be misbranded.

Under FHSA, precautionary warnings on tags, 'placards, signs, or shelf **labels** cannot be used as a substitute for

cautionary **information** 'directly on the label. Likewise, precautionary **warnings** that appear on **literature** accompanying a product must be identical to precautionary **statements** on the label. Furthermore, the accompanying **literature** must convey all the **warnings, principal** statements of hazard, precautionary **use** statements and storage instructions on the label. The manufacturer cannot be selective among these FHSA requirements and cannot avoid giving them simply by omitting express directions for use such as storage or handling instructions.

For example, a manufacturer of 3-5% ammonia could not state on literature: "**Warning:** Irritant Harmful if Swallowed," without also providing precautionary use statements like "Avoid contact with eyes or prolonged contact with skin." The manufacturers could not avoid having to give the precautionary use statement simply by giving the foregoing warning and omitting the instruction "Do not mix with chlorine type bleaches or other household chemicals."

7. California Proposition 65 "Directions for Use"

The California Safe Drinking Water and Toxic Enforcement Act of 1986 ("Proposition 65") requires persons doing business in California to provide a "clear and reasonable **warning[s]**" to consumers prior to exposing them to certain chemicals "known to cause cancer or reproductive toxicity." Cal. Health and Safety Code § 25249.6. Proposition 65 provides that warnings may be transmitted by various methods such as labeling, posting shelf signs, or placing notices in the news media, as long as the warnings are "clear and reasonable." Cal. Health and Safety Code § 25249.11(f). California's regulations also establish acceptable content and methods of transmitting "clear and reasonable" warnings for each category. 22 C.C.R. § 12601. These minimum standards for warnings are referred to as "safe harbors" since, if complied with, they **are deemed** by the Agency to provide a warning which is clear and reasonable. Revised Final Statement of Reasons accompanying 22 C.C.R. § 12601 at 2, 7 ("Statement of Reasons"). For each type of exposure the warning language must "clearly communicate that the chemical in question is known to the state to cause cancer, or birth defects or other reproductive harm." 22 C.C.R. § 12601(a).

For example, for consumer products that contain a chemical known to the state to cause cancer, the safe harbor warning message must include the following language: WARNING: This product contains a chemical known to the State of California to cause cancer.* For consumer products that contain a chemical known to the state to cause reproductive toxicity, the safe harbor warning message must include the following language: